BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROWANA RIGGS	)	
Claimant	)	
VS.	)	
	)	Docket No. 223,954
THE BOEING COMPANY	)	
Respondent	)	
AND	)	
	)	
AMERICAN MANUFACTURERS MUTUAL	)	
INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals from an Award entered by Administrative Law Judge John D. Clark dated December 31, 1998. The Appeals Board heard oral argument on June 11, 1999 in Wichita, Kansas.

APPEARANCES

Claimant, Rowana Riggs, appeared pro se. Frederick L. Haag of Wichita, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopts the stipulations listed in the Award. Although several different ending dates for the alleged series of accidents were alleged during the trial, neither party has made date of accident an issue for review. Therefore, for computation purposes the Appeals Board adopts the date of accident set forth in the Award, which is the last day of August 1996.

ISSUES

The Administrative Law Judge denied all benefits finding claimant failed to prove her physical problems were caused by her job. Stated another way, claimant failed to prove she sustained personal injury by accident arising out of and in the course of her employment with respondent. Should that issue be resolved in claimant's favor, then the nature and extent of claimant's disability will need to be determined. Respondent also raised an issue about objections it made to questions concerning certain medical records that it contends were never admitted into evidence. Respondent further contends that claimant did not sustain any

lost time from work due to her alleged injuries and, therefore, she is not entitled to compensation, other than medical benefits, pursuant to K.S.A. 44-501(c).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the briefs and arguments of the parties, the Appeals Board finds, for the reasons explained below, that the Award entered by the ALJ should be reversed.

Findings of Fact

(1) Claimant testified that she notified respondent of her injury on November 8, 1991 and was given work restrictions. Almost six years later, on August 11, 1997, she was diagnosed with carpal tunnel syndrome by a Boeing doctor, Dr. Smith. In between these dates, claimant reported to the Boeing medical office with complaints of pain in her upper extremities on several occasions. She was also given restrictions on April 21, 1992 and was required to wear wrist splints on the job from December 4, 1992 until December 23, 1992.

(2) On April 18, 1997 nerve conduction studies were performed by Dr. Rizwan Hassan. These tests revealed mild bilateral carpal tunnel syndrome. Dr. James Gluck examined claimant on July 28, 1997 and diagnosed bilateral upper extremity cumulative trauma disorder and mild bilateral carpal tunnel syndrome. Likewise, Boeing's company physician, Dr. Smith, diagnosed claimant with mild carpal tunnel syndrome on August 11, 1997.

(3) The testimony of orthopedic surgeon Dr. Harry A. Morris shows that he first saw claimant on December 11, 1992 for complaints in both upper extremities. He diagnosed bilateral carpal tunnel syndrome from cumulative trauma or overuse. He recommended claimant continue using wrist splints and ordered nerve conduction studies. Claimant returned on January 12, 1993 and described that she had an improvement in her symptoms over the holidays. Dr. Morris said this was as expected because cumulative trauma should get better with less activity. Also, respondent had moved claimant to a job that put less stress on her hands.

Claimant returned to Dr. Morris on October 9, 1996 and related that her symptoms were worsening. Claimant attributed this worsening to operating a dotco at work and it was causing her trouble in her upper extremities. When claimant next returned on November 6, 1996 she had tingling, numbness and pain in her upper extremities consistent with carpal tunnel syndrome. Testing for carpal tunnel syndrome was mildly positive and there was soreness with testing of the tendons which Dr. Morris likewise attributed to overuse. Dr. Morris diagnosed overuse tendonitis. He had limited in October 1996 claimant's use of vibratory power tools at work to four hours a day. She was to do exercises and continue to wear splints at night. At the November 6, 1996 examination, claimant stated that her regular job duties had been less difficult or stressful than the accommodated job she had been given. She was being required to do sweeping instead of things that involved vibration but claimant did not think the sweeping was beneficial for her. Therefore she requested that Dr. Morris lift

her restrictions so that she could return to her regular job. Even though claimant's exam was positive for carpal tunnel syndrome and there was more soreness of the tendons, Dr. Morris complied with claimant's request by removing her restrictions except for the recommendation that claimant have a break periodically to give her hands and upper extremities a chance to rest. Claimant also asked about working overtime. Dr. Morris informed her that the more she worked the sorer she would get.

(4) Dr. Morris next saw claimant on December 4, 1996. At that time claimant's symptoms seemed about the same. She described a lot of pain to the wrists and some tingling and numbness throughout the day but none at night. But at the next office visit on February 10, 1997 claimant complained of paresthesias in her fingers and pain in hands, wrists and now moving up the arms to the shoulders. Dr. Morris attributed these symptoms to overuse and prescribed medication. He last saw claimant on April 14, 1997 and again diagnosed overuse injuries from the hand up to the shoulder, and bilateral carpal tunnel syndrome that was worse than the previous exam. Nevertheless, he released her without restrictions. He discussed work limitations with claimant but she preferred to stay with her regular duty, stating she needed the money.

Using the Fourth Edition of the AMA Guides to the Evaluation of Permanent Impairment, Dr. Morris rated claimant's impairment as 0 percent. In his opinion claimant could continue to perform her regular work without restrictions but that she would be sore. He indicated alteration of work tasks may help to reduce symptoms. Dr. Morris also discusses in his testimony, as apparently relevant, an example given in the AMA Guides where if a patient had a recurrence of symptoms upon a return to work, even with a negative physical examination and tests, the patient should not return to her former job.

(5) The record also contains the testimony of Lynn D. Ketchum, M.D., who is board certified in plastic surgery and surgery of the hand. He saw claimant on October 31, 1997. At that time claimant gave Dr. Ketchum a history of "problems in both of her upper extremities from doing repetitive work with vibratory tools for a significant period of time." Dr. Ketchum's testimony goes into some detail concerning claimant's job duties with respondent. Claimant denied having problems with her upper extremities before beginning her employment with respondent. Dr. Ketchum performed a physical examination on claimant and did nerve conduction studies of the ulnar nerves which were essentially normal. He did not do nerve conduction of the median nerves because he had the recent April 18, 1997 studies by Dr. Hassan that demonstrated mild bilateral carpal tunnel syndrome. He diagnosed her with bilateral mild carpal tunnel syndrome and bilateral thoracic outlet syndrome with attendant weakness.

Based upon this diagnosis, Dr. Ketchum considered appropriate restrictions to include limiting hand grinding to three hours a day, limiting computer use to two hours at a time and four hours maximum per shift, no prolonged repetitive use of the right thumb, avoid polishing for prolonged periods of time with task rotation every two hours, no overhead work, and no repetitive gripping.

(6) Using the Fourth Edition of the AMA Guides, Dr. Ketchum rated claimant's permanent impairment at 15 percent to each upper extremity for an 18 percent impairment to the body as a whole. On cross-examination respondent's counsel asked Dr. Ketchum questions about the history and statements claimant made to Dr. Morris during the course of his treatment of her. Dr. Ketchum said he had reviewed those records as a part of his examination of claimant. The method employed by Dr. Morris in using the AMA Guides to arrive at his opinion on permanent impairment was specifically discussed. Dr. Ketchum pointed out that Dr. Morris had used a different diagnosis in making his rating.

(7) Dr. Ketchum did not recommend any additional treatment stating that claimant was at maximum medical improvement when he saw her other than a comment that another test could be done to see whether she had improved since she stopped using vibratory tools. He agreed that the problems he saw claimant for in October 1997 had their onset in 1991 and were a continuation of problems that existed at that time. Dr. Ketchum did not take claimant off work and stated that the job claimant described she was doing at the time he examined her appeared to be within her restrictions. The record shows the most recent job claimant described to Dr. Ketchum was driving a runner or scooter.

(8) Respondent correctly points out that Dr. Ketchum never specifically said that claimant's physical condition or her impairment of function was caused by her employment. Nevertheless, the record taken as a whole leads to this conclusion.[1] The claimant's restrictions were clearly aimed at her job duties. Claimant's uncontradicted testimony was that these activities were causing her symptoms and this was the history Dr. Ketchum was given and that he relied upon in arriving at his diagnosis and rating.

Conclusions of Law

Under the Kansas Workers Compensation Act (Act) it is the claimant's burden of proof to establish the claimant's right to an award of compensation and to prove the various conditions on which that right depends.[2]

The Act is to be liberally construed to provide the protections of the Act to employers and employees but it is to be applied impartially to both.[3]

"In a workers compensation case, if evidence is presented that is uncontradicted, and not improbable, unreasonable, or shown to be untrustworthy, the finder of fact cannot

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[1] See Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[2] K.S.A. 1996 Supp. 44-501(a); Brobst v. Brighton Place North, 24 Kan. App. 2d 766, 778, 955 P.2d 1315 (1997).

[3] K.S.A. 1996 Supp. 44-501(g); Boucher v. Peerless Products, Inc., 21 Kan. 977, 981, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996).

disregard this evidence. Uncontradicted evidence should generally be regarded as conclusive."[4]

To receive workers compensation benefits, the claimant must show a "personal injury by accident arising out of and in the course of employment."[5] The question of whether there has been an accidental injury arising out of and in the course of employment is a question of fact.[6]

In Kindel v. Ferco Rental, Inc., 258 Kan. 272, 278, 899 P.2d 1058 (1995), the Supreme Court stated the general principles for determining whether a worker's injury arose out of and in the course of employment:

> The two phrases arising "out of" and "in the course of" employment, as used in our Workers Compensation Act, K.S.A. 44-501 *et seq*., have separate and distinct meanings; they are conjunctive, and each condition must exist before compensation is allowable. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. **An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury.** Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service. (Emphasis added.)

Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to each case.[7]

The phrase "arising out of" employment requires some causal connection between the injury and the employment.[8]

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[4] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 285, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[5] K.S.A. 1996 Supp. 44-501(a); Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 197, 689 P.2d 837 (1984).

[6] Harris v. Bethany Medical Center, 21 Kan. App. 2d 804, 805, 909 P.2d 657 (1995).

[7] Newman v. Bennett, 212 Kan. 562, 568, 512 P.2d 497 (1973).

[8] Pinkston v. Rice Motor Co., 180 Kan. 295, 302, 303 P. 2d 197 (1956).

In this case the precipitating actions causing the injury, according to all the evidence, occurred over time as a result of claimant's regular work activities. The ALJ found that the record "contains nothing as to the conditions and incidence of her [claimant's] employment which would have a causal connection to any physical problems of which she is presently complaining." The Appeals Board disagrees. The fact that all of the physicians diagnosed an overuse or cumulative trauma disorder and determined work restrictions were necessary to prevent further injury is evidence of a causal relationship between claimant's job duties and her injuries or physical condition. Although claimant could certainly have made a better record concerning what specific job duties caused or contributed to her symptoms, the record is, nevertheless, replete with instances where claimant sought medical treatment both at work and away from work for symptoms she attributed to those activities and her testimony is uncontradicted. Furthermore, the resulting restrictions were directly aimed at her work activities. The Appeals Board finds a causal connection has been established.

Respondent alleges K.S.A. 1996 Supp. 44-501(c) acts as a bar to any compensation other than medical benefits.[9] This statute was amended effective April 4, 1996 and therefore would not apply to any accidental injury after that date. Claimant alleges a series of accidents each and every working day through August 1996. Dr. Morris did not give an opinion as to claimant's permanent functional impairment until after his April 14, 1997 examination. Dr. Ketchum found claimant had reached maximum medical improvement when he saw her on October 31, 1997. The Appeals Board finds claimant has proven a series of accidents each and every working day through August of 1996 as alleged.[10] Based upon this date of accident, the amended version of K.S.A. 44-501 applies.[11] Furthermore, claimant testified that she was moved to another job due to her pain and restrictions. This constitutes being disabled from the work she was doing and satisfies the requirements of the former version of K.S.A. 44-501. Also, claimant estimated she missed 500 days of work "from 1991 to present" because of her carpal tunnel syndrome, and that her restrictions, if implemented, would prevent her from doing the jobs she has done at Boeing.[12]

Claimant is still working for respondent earning a comparable wage. Therefore, claimant's permanent partial disability compensation is limited to the percentage of functional impairment.[13]

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[9] Osborn v. Electric Corp. of Kansas City, 23 Kan. App. 2d 868, 936 P.2d 297, *rev. denied* 262 Kan. 297 (1997); Boucher, *supra*.

[10] Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[11] Condon v. Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995).

[12] Transcript of 11/3/98 Regular Hearing, p. 14.

[13] K.S.A. 1996 Supp. 44-510e(a).

The Appeals Board finds the testimony of Dr. Ketchum to be the most persuasive evidence of functional impairment. Based upon that testimony, the Appeals Board finds claimant has an 18 percent permanent partial general disability.

Respondent has requested a ruling on its objections to certain evidence. At his August 31, 1998 deposition, claimant presented Dr. Ketchum with what was purported to be permanent restrictions placed on her by Boeing Central Medical. Respondent's counsel objected to Dr. Ketchum being asked whether those restrictions were consistent with carpal tunnel syndrome because they had not been admitted into evidence and were not a part of the record. Dr. Ketchum testified that the restrictions were appropriate for claimant's carpal tunnel syndrome condition, which he diagnosed, and added to those restrictions no overhead work, due to her thoracic outlet syndrome, and no repetitive gripping. Thus, Dr. Ketchum adopted the restrictions shown to him by claimant and made them a part of his own recommendations based upon his own examination of claimant. Furthermore, medical experts may rely upon the reports of nontestifying physicians in forming their opinions.[14]

Respondent made a similar objection at page 9 of the deposition transcript when claimant asked Dr. Ketchum to review "a CTS test which was done by ViaChristi Regional Medical Center St. Joseph." Dr. Ketchum noted those test results were similar to the results obtained in the EMG tests performed by Dr. Hassan - which respondent had made no objection to. Dr. Ketchum's answer will stand. At page 16 respondent also objected to Dr. Ketchum reading from a pamphlet about carpal tunnel syndrome. Since Dr. Ketchum was not asked any questions about the statements he read, that objection is sustained.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated December 31, 1998, should be, and is hereby, reversed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Rowana Riggs, and against the respondent, The Boeing Company, and its insurance carrier, American Manufacturers Mutual Insurance Company, for an accidental injury which occurred August 31, 1996. Claimant is awarded 74.7 weeks for an 18% permanent partial general disability at the maximum weekly rate of $338 per week making a total award of $25,248.60, which is ordered paid in one lump sum less any amounts previously paid.

Respondent is ordered to pay all reasonable and related medical expenses.

Future medical is awarded upon proper application to and approval by the Director.

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[14] Roberts v. J.C. Penney Co., 263 Kan. 270, 949 P.2d 613 (1997).

An unauthorized medical allowance of up to $500 is awarded upon presentation to respondent of an itemized statement verifying same.

Claimant's former counsel, Joseph Seiwert, has filed a lien, and thus approval of attorney fees and the contract of claimant's former counsel is contingent upon resolution of the lien, either through agreement or hearing before the Administrative Law Judge.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carriers to be paid as follows:

Barber & Associates	
Transcript of regular hearing	$ 59.50
Transcript of regular hearing	112.60
Ireland Court Reporting, Inc.	
Transcript of regular hearing	71.31
Deposition Services	
Transcript of regular hearing	131.80
Deposition of Harry A. Morris, M.D.	150.80
Deposition of Cash Taylor	111.50
Hostetler & Associates, Inc.	
Deposition of Lynn D. Ketchum, M.D.	153.75

IT IS SO ORDERED.

Dated this ____ day of August 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Rowana Riggs, 1904 N. Ash, Wichita, KS 67214
Joseph Seiwert, Wichita, KS
Frederick L. Haag, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director